Supreme Court, U.S.
FILED

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Docket N0_____

IN THE SUPREME COURT OF THE UNITED STATES

Russell D, Mikel, *por se* **Ruth Allen**

Petitioners ***vs.*** ***Respondents***

Amy C. Mikel, *por se* **Mae Wendorf**

On Petition for a Writ of Certiorari to
The Supreme Court of Virginia
991995

PETITION FOR WRIT OF CERTIORARI

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24pp

THE QUESTION PRESENTED

Queston #1.

Are the mandatory provisions of 42 U.S.C. 4852d and related and supporting statutes and regulations which provides safeguards from lead-based paint hazard in targeted residential properties (dwellings with attached bedrooms) also mandatory for like commercial properties (properties with 0-bedrooms) and where there is no residential use and where no such use is contemplated?

Question #2.

If the answer to Question # 1 is in the negative, then, does it not follow that the judge in this case has based his judgment on a false legal premise supported by neither facts of record nor rules of law and is a nullity?

PARTIES WHOSE JUDGMENT IS SOUGHT FOR REVIEW

The Honorable Frank A. Hoss, presiding, Prince William County, Virginia, Circuit Court Chancery No. 42800, heard on July 15, 1998.

I

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TABLE OF AUTHORITIES

1. Jurisdiction of the Court is invoked under Title 28, United States Code 1257(a)

2. Public Law 102-550

3. Title X of the Housing and Community Development Act of 1992.

4. 42 U.S.C. 4852d.

II

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

1. Findings and rulings of the Prince William County Virginia Circuit Court July 15, 1998 on the Bill of Complaint for Specific Performance. Finding was for the defendants.

2. Findings and ruling of the Prince William County Virginia Circuit Court August 28, 1998, on a Motion for Reconsideration. The motion was denied.

3. Refusal of a Petition for Appeal by the Supreme Court of Virginia February 12, 1999. In responce to the Petition for Appeal the court stated:

> "Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal the Court is of the opinion there is no reversable error. Accordingly, the Court refuses the petition for appeal."

4. Denial of Petition for Rehearing by the Supreme Court of Virginia April 16, 1999. Upon a Petition for Rehearing the Court stated:

> "On consideration of the petition of the appellants to set aside the

judgment rendered herein on the12th day of February, 1999 and grant a rehearing thereof, the prayer of the said petition is denied."

III

BASIS FOR JURISDICTION OF THE COURT

1. Dates of the Orders or Judgment Sought to be Reviewed:

a. This cases was heard in the Prince William County Virginia Circuit Court on July 15, 1998, Chancery Number 42800. The Court found for the defendants. The appellants took exception to the ruling at that time.

b. The final order of Chancery 42800 was signed by the circuit court judge August 28, 1998. At the same time the judge wrote on the order "seen and excepted to" and then the appellants each signed the objection. (see Annex A-2)

c. The plaintiffs filed a Petition for Appeal to the Supreme Court of Virginia on September 28, 1998, Record Number 981995.

2. Dates of Orders Respecting Rehearings:

a. The Plaintiffs filed a Motion for Rehearing of the Circuit Court ruling on August 12, 1998. The motion was heard on August 28, 1998 and denied. (seeAppendix B-1)

b. On February 25, 1999 the plaintiffs filed a Petition for Rehearing of the Petition for Appeal to the Supreme Court of Virginia of February 12, 1999, Control Number 981995. The petition was denied April 16, 1999. This is the last action. (see Appendix B-2)

3. The ruling on Chancery 42800 was excepted to by the plaintiffs in the circuit court, the record shows that all intrim actions to bring this before The United States Supreme Court were executed in a timely manner, and with the last action being dated April 16, 1999 and this petition being filed in less than 90 days from that date, it is submitted that this petition qualifies for review within the jurisdiction of the Supreme Court of the United States under the provisions of Rule 13.1.

IV

CONSTITUTIONAL AND STATUARY PROVISIONS INVOLVED

1. Residential Lead-Based Paint Hazard Reduction Act of 1992, Public Law 102-550, approved October 28, 1992 (Title X of the Housing and Community Development Act of 1992).

a. Department of Housing and Urban Development
24 CFR Part 36 Rin 2501-AB58. The relevant part of this act lies in the scope of its application. This is stated in a glossery of *Definitions.* Included is:

> **"(27) Target Housing--The term 'Target Housing' means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or 0-bedroom dwellings."**

b. Environmental Protection Agency, 40 CFR Part 745 (OPPTS-621130A; Fri/-5347-0)

RIN 2070-AC75. The scope of its application is cited in its glossery of definitions which state in Part 745-Lead-Based Paint Poisioning Prevention in Certain Residental Structures, Subpart 705-103 *Definitio*n, which state:

> **"*The Act* means the Residental Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4852d."**
>
> **"*Target Housing* means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or 0-bedroom dwellings."**

V

STATEMENT OF THE CASE

1. This is the extension of an equity suit in which the plaintiffs seek to enforce the terms of a sales contract of commercial property and in which the purchasers breached without cause.

2. The property involved is historical property located in the historical section of the City of Manassas, Virginia. Improvements on the property include a manor house built at the turn of the century. The property is zoned B-3, commercial, a specific zoning for the historical section. The manor house is a two-story frame structure that has probably been painted many times with lead-based paint in past years. This is the heart of the problem.

2. Tests confirm the presence of lead-based paint but also show the paint in good condition, and presented no hazard for this property. The purchasers were appraised of this fact and given a 10-day window from the date they received the results of the tests during which they could cancel the contract, if they so wished. They declined to do so.

3. Approxametly one months later and a few days before the scheduled settlement, the purchasers informed the sales representative that they were cancelling the contract because of their concerns about the lead-based paint. The sellers rejected this act as not being timely and without authority. The purchasers failed to make the settlement. The terms of the contract had been drawn up by the buyers and presented to and accepted by the sellers, without change. These

terms were that the sale of the property was "AS IS" and for cash. The matter of the lead-based paint was irrelevant, also, the buyers did not alledge that there was any hazard.

4. This equity suit was heard in the Prince William County Virginia Circuit Court and the judge found for the defendants. Judge Hoss found that the contract was complete inasmuch as the sellers had accepted and signed the contract offer presented by the buyers, without change, but that the contract itself did not comply with certain required provisions of paragraph 28 which reads, and he then quotes a part of paragraph 28 as follows:

> "This contract is not complete and not ratified unless it includes and the sellers and the purchasers both accept, the following two ammendatory forms: A. 'Sales Disclosure and Acknowledgement of Information on Lead-Based Paint and/or Lead-Based Paint Hazards' AND B. 'Sales Contract Addendum for Lead-Based Paint Testing'."

5. The benefits that would have been given the purchasers, had these forms been included, were given to them on a gratuitous basis at the buyers request and under another

addendum, but not on the forms specifically identified above. The defendents have never complained to the sellers that they were denied any benefits under this action. Nevertheless the judge passed judgment and ruled:

> ", , , but the fact is, and there can be no dispute about this, they (the ammendatory forms) were not made a part of the contract, as required. Without these forms being made a part of the contract, the provisions in them providing for how to cure this problem, if there was one, any paint problem or radon problem is of no moment as I see it. This contract is not complete. The Buyers could terminate the same as they did in a fairly timely fashion. I find for the defendants."

6. The specific forms were not included because it was the contention of the sellers, then, as it is now, that they were not required by law or for any administrative purposes. It would appear from the ruling that the contract would have been made whole had only blank forms been included.

7. There is a more serious side to this issue. The appellants assert that Judge Hoss took his authority for the ruling and judgment out of

context from what paragraph 28 actually states. He failed to include the qualifying phrase immediately preceeding his quotation which reads:

> **". . . unless exempt under 42 U.S.C. 4852d . . ."**

This property is clearly exempt under the cited authority and, therefore, the remainder of paragraph 28 is a nullity.

8. 42 U.S.C. 4852d applies only to targeted residental properties identified as dwellings. And then only to dwellings with attached bedrooms. The property which is the subject of this appeal is commercial property and not a dwelling. Furthermore, the definition of targeted properties exempts all properties that have 0-bedrooms. This property, as commercial property, has no bedrooms.

9. During the trial and particularily during the rehearing the plaintiffs made it clear to Judge Hoss that this property was not residential property and as such was not subject to the safeguard requirements of 42 U.S.C. 4852d. Likewise, the attorney for the defendants stated in his opening remarks "I agree the contract has a provision, 42 U.S.C. -59, if that applies as a

paragraph there, that section applies to residental housing. It does not apply to commercial housing. We agree with that."

VI

REASONS FOR GRANTING THE PETITION

1. The Prince William County Circuit Court of Virginia ruling confirmed by the Supreme Court of Virginia has decided an important question of federal law that has not been, but should be settled by this Court.

2. The Circuit Court has arbitrarily extended the mandatory requirements of 42 U.S.C. 4852d and related and supporting laws and regulations with reference to lead-based paint and its applicartion to residential properties to include commercial properties. The Virginia courts established a highly detrimental precedent when they ruled that this sales contract of commèrcial properties constructed prior to 1978, could not be adjudged ratified unless it also included the provisions for lead-based paint testing giving the buyer an option to cancel the contract if the seller does not remedy any hazards that would be identifiable under the standards established exclusively for targeted residential properties.

3. The Supreme Court of Virginia found no "reversible error" in this ruling. This ruling is adverse to the interests of a large and important class of property owners. Particularily hard hit by this ruling, but not exclusively, are owners of historical properties who have, or plan to restore or renovate older properties for their preservation and subsequent use as commercial properties to help pay for the cost, such as this property. This property was purchased over twenty years ago and has been under various stages of restoration ever since. This is not an endeavor one goes into for profit. It costs approximately one and one half times as much to restore these properties than to build them from the ground up. The costs of abatement treatment required under 42 U.S.C. 4952d would exceed the value of the property in many instances. Preservation interests are performed by those interested in and dedicated to the preservation of the history and culture of our nation. Once restored many of these properties are used to house activities with similar interests. This property has had only one tenant--The Center for the Arts, a nonprofit organization serving the City of Manassas and Prince William County. The rulings of the Virginia courts will curtail this in the future.

4. It has been argued that the impact may not be so great in the future because in future court cases the judges may be more tolerent of the federal statutes. As preservationalists we must submit that there may not be many future cases. This ruling has not gone by unnoticd. Most restoration efforts require some financing. No financial institution will finance a sales contract that cannot be ratified and where any title will be clouded. Those who are financially able will not invest in property where there is very little hope, if any, of ever recovering their investment in the furure.

5. The extension of the mandatory requirements of 42 U.S.C. 4952d by Judge Hoss to include commercial properties should never have happened, but it did. It is contrary to the very laws written to protect those engaged in historical and other preservations. It is totally unecessary; there is no requirement or need for it.

6. A certiorari will correct this.

VIII

APPENDIX

A-1 Final order of the Prince William County Virginia Circuit Court.

A-2 Judgment of the Supreme Court of Virginia.

B-1 Motion for the reconsideration of the Final Order, Prince William County Circuit Court.

B-2 Petition for Reconsideration of the judgment of the Supreme Court of Virginia.

VIRGINIA
IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RUSSELL D. MIKEL, et. al.,	)	
	)	
Plaintiffs	)	
vs.	)	Chancery No.
42800	)	
	)	
RUTH ALLEN, et al.,	)	
	)	
Defendants	)	

FINAL ORDER

THIS MATTER CAME BEFORE THE COURT for trial on plaintiffs Bill of Complaint for Specific Performance on July 15, 1998, the plaintiffs, Russell D. Mikel and Amy C. Mikel represented by their attorney, Zachary B. Cotner, Esquire, and the defendants, Ruth Allen and Mae wendorf, represented by their attorney, Charles G. Preston, Esquire.

WHEREUPON, the court having examined the services of process and the duly executed returns thereon, the pleadings, the contract sued on, the subsequent agreements of the parties, the exhibits of this case, and the answer, and and considered the testimony of the witnesses at trial, it is *(cont'd)*

determined that the Defendents are entitled to judgement, it is therefore

ADJUDGED, ORDERED AND DECREED that plaintiffs Bill of Complaint to specific performance be and the same is radon provisions of the contract were part of the contract, and as required by the conduct of the parties, but were not included in the contract by plaintiffs' agent, accordingly the contract was not complete and Defendants could properly terminate as they timely did, and it is further

ADJUDGED, ORDERED and DECREED that the clerk of court is hereby directed to send a copy of this order to all counsel and parties of record.

ENTERED THIS 28th day of August, 1998.

I ASK FOR THIS

Charles G, Preston, P. C.
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(703) 759-3301
/s/Charles G. Preston
Virginia Bar Number 26873
Counsel for Defendants

Seen and Excepted to

/s/Russel D. Mikel
/s/ AmyC. Mikel

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of February, 1999.

Russell D. Mikel, et. al.,
Appellants

against **Record No. 981995**
Circuit Court No. 42800

Ruth Allen, et. al..
Appellees

From the Circuit Court of Prince William County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment comp;lained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/_____
Deputy Clerk

V I R G I N I A : IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

Russell D. Mikel, et. al.	)	
	)	
Plaintiff	)	**Chancery No. 42800**
	)	
vs.	)	
	)	
Ruth Allen, et. al.,	)	
	)	
Defendants	)	

ORDER

This cause came on this day to be heard on August 28, 1998 upon Plaintiffs' Motion for Reconsideration of the Judgment of July 15, 1998 of this Court denying Plaintiffs' cause of action and dismissing the case, and was argued by counsel for Defendants and by Mr. Mikel, pro se, for plaintiffs.

Upon consideration whereof, the Court, being of the opinion that said motion should be denied, it is therefore. ***(cont'd)***

Adjudged, ordered, and decreed that Plaintiffs' Motion for Reconsideration of this Court's rulings of July 15, 1998 in this matter is denied.

Entered this 22 Day of September, 1998

/s/_____
JUDGE FRANK A. HOSS, JR.

I ASK FOR THIS:

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of April, 1999.

Russell D. Mikel, et. al.,
Apppellants

against Record No. 981995
Circuit Court No. 42800

Ruth Allen, et. al.
Appallees

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside judgment rendered herein on the 12th day of February, 1999 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy.

Teste:
/s/_____

Clerk

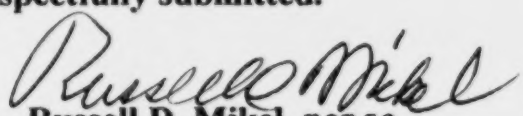
APPENDIX B-2

VIII

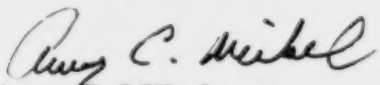
CONCLUSION

It is concluded that the Petition for Writ of Certiorari should be approved.

Respectfully submitted.



Russell D. Mikel, *por se*



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